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In The

Supreme Court of the United States

JOEL S. MEISEL;
NEW WORLD PARKING, LLC;
WORLDWIDE PARKING INCORPORATED,

Petitioners,

v.

BESIR KEMAL USTAOGLU;
HASIBE USTAOGLU;
REPIMEKS DIS TICARET LIMITED SIRKETI,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTIONS PRESENTED

I. Whether the court's ability to dismiss on international comity grounds is limited by its obligation to exercise jurisdiction and preserve due process in a case where all parties are U.S. residents and the injury occurred in the forum.

II. Whether *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), extends to dismissal of an action for damages because of first-filed parallel foreign litigation.

III. Whether under *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947), and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), a U.S. resident is foreclosed from suing in his home forum primarily for the reason that a parallel lawsuit is in progress overseas in a case where all parties are U.S. residents, where the law to be applied is local law and where the injury occurred in the U.S. forum.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT IN ACCORDANCE WITH RULE 29.6 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES.

The Petitioners are Joel S Meisel, New World Parking, LLC, and WorldWide Parking Inc. who were the plaintiffs-appellants below and shall be referred to as "Petitioners," "Appellants," or "Plaintiffs" throughout this petition. Joel S Meisel is an individual. New World Parking, LLC is a privately owned Delaware LLC. WorldWide Parking Inc. is a privately owned Delaware corporation.

The Respondents are Besir Kemal Ustaoglu, Hasibe Ustaoglu, and Repimeks Dis Ticaret Limited Sirketi, who were defendants-appellees below and shall be referred to as "Respondents," "Appellees," or "Defendants" throughout this petition. Besir Kemal Ustaoglu and Hasibe Ustaoglu are individuals. Repimeks Dis Ticaret Limited Sirketi is a privately held Turkish corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Joel S Meisel, New World Parking, LLC, and WorldWide Parking Inc., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered into on March 6, 2001.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is not reported and is annexed hereto. (App. 1). The decision affirmed in whole the United States District Court for the District of Maryland entered into on March 31, 2000. This order dismissed plaintiff's case on the grounds of international comity and *forum non conveniens*. The District Court's order and opinion is not reported and is annexed hereto. (App. 4).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 6, 2001. Petitioners' timely petition to the Court of Appeals for rehearing and rehearing *en banc* was denied on April 17, 2001. That order is annexed hereto. (App. 18). This petition is timely filed within ninety days of the denial of the petition for rehearing and rehearing *en banc*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution which provide: "No person shall . . . be deprived of life, liberty or property, without due process of law . . . ." This case also involves 28 U.S.C. §1391(d) which states that "an alien may be sued in any district."

STATEMENT OF THE CASE

The plaintiffs in this case are an individual owner and a predecessor and successor company whose headquarters are in Rockville, Maryland. The defendants are a Turkish company and its principals who currently reside in the United States and who were personally served at their home in the United States. Petitioners are in the business of providing parking meter management services to cities in the United States and abroad. In 1994, Petitioner Joel Meisel gave approximately $1.3 million in loans from his personal funds with no accompanying loan documents which moneys were given to the Ustaoglus for the purpose of buying and installing parking meters in Istanbul. In 1995, the parties entered into a written Protocol by which terms the Ustaoglus acknowledged that they received the loans from Maryland and promised to pay back the loans to Maryland. None of the documents contained a forum selection or choice of law clause. The documents were personally negotiated by the parties and primarily written by Petitioners' lawyer who is a resident of both Maryland and Turkey.

In September of 1996 after the Ustaoglus failed to begin to repay the loans, Petitioners sued in the courts in Istanbul, Turkey. The courts in Turkey have held 26 investigative hearings since September 1996 with a 27th investigative hearing set for October 24, 2001. There is no

end in sight to the Turkish proceedings and Petitioners have raised allegations of corruption in the Turkish courts. Petitioners presented affidavits in the court below showing that Respondents have moved their assets from Turkey to the United States including all or part of the $1.3 in loan money at issue in this case.

In November 1998, Petitioners filed a lawsuit against Respondents in the Federal District Court in Maryland. The Maryland complaint set out tort and contract counts under Maryland law focusing on the unpaid loans which complaint asked for an amount in damages equal to the outstanding unpaid loans. From November 1998 until December 1999, Petitioners could not locate the Ustaoglus in order to perfect service on them. At the end of December 1999, the Ustaoglus were served at a home they had purchased in the State of Washington in the United States.

The Ustaoglus' motion to dismiss the Maryland case on the ground of *forum non conveniens* and international comity was granted by the federal district court in Maryland relying primarily on the ground that a parallel case was in process in Turkey. The Fourth Circuit Panel affirmed the lower court decision with no written decision.

REASONS FOR GRANTING THE WRIT

This Petition for Certiorari is based primarily on two grounds both of which merit review. First, the federal courts have failed to follow *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706 (1996), and its application to the question of international comity has caused difficulties in the circuits. When confronted with parallel litigation overseas, the circuits are unclear whether a federal court should accept concurrent jurisdiction, abstain (and if so, on what theory) or dismiss. Lacking guidance from the Supreme Court, the circuits have grafted domestic jurisdictional and common law doctrines onto the international arena. This case raises

the question of whether cases dealing with domestic federal/state juridical relations such as *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), and *Quackenbush*, are appropriately extended to cases dealing with federal/foreign country juridical relations.

Second, with respect to application of the *forum non conveniens* doctrine, the circuits have strayed from this Court's teachings in *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947), *Koster v. Lumbermens Mutual*, 330 U.S. 518 (1947), and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), particularly with respect to the amount of deference to be shown to a U.S. resident plaintiff. New decisions from the Second Circuit, in particular, have highlighted the split in the circuits on this issue.

These issues are important because increased international economic activity compels the need for additional transnational dispute settlement forums in the United States. This exacerbates the tension between domestic and foreign individuals who want access to the U.S. courts to resolve these disputes and domestic courts which look for docket-clearing mechanisms. Petitioners argue that where foreign parties to international business transactions take actions which have a direct adverse impact in the United States causing injury in the forum, they should be required to defend their actions in U.S. courts. This is particularly true where, as here, those adverse actions took place while the foreign parties resided in the United States. Other litigants argue that where U.S.-based individuals or companies set out to do business overseas, they should be prepared to adjudicate overseas regardless of the amount of U.S.-interest involved in the litigation. The lack of guidance from the Supreme Court has led to conflicts among the circuits in applying the law. The Court should grant *certiorari* in this case to resolve these conflicts on several

important aspects of international comity, *forum non conveniens,* abstention and concurrent jurisdiction. This case encapsulates the confusion within the federal court system on all of these issues and is the perfect vehicle for review of these doctrines by the Supreme Court because it has very straight-forward facts which could be broadly applied to many situations. [1]

I. The court's ability to dismiss on international comity grounds is limited by its obligation to exercise jurisdiction and preserve due process.

The Supreme Court has not yet addressed the issue of whether the existence of a foreign proceeding alone should determine a dismissal on the ground of international comity. As pointed out by the court in *Dragon Capital Partners LP v. Merrill Lynch Capital*, 949 F. Supp. 1123, 1127 (S.D.N.Y. 1997), "where the doctrine of comity is concerned, the Supreme Court has not yet articulated the standard for determining whether to stay or dismiss an action in deference to a foreign proceeding." The *Dragon Capital* court further noted that its discretion is not boundless with respect to applying the comity doctrine where a prior action is pending overseas and is limited by its obligation to exercise jurisdiction. *Id.* (citing *Caspian Inv. Ltd. v. Vicom Holdings, Ltd.*, 770 F. Supp. 880, 884 (S.D.N.Y. 1991)).

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[1]The case involves standard contract and tort claims filed in the home forum where all of the plaintiffs reside at the same time that a parallel action involving the same parties is on-going overseas. The questions presented here are particularly important because Petitioners have no effective remedy in Turkey. They presented affidavits to the court below showing that Respondents moved their assets from Turkey to the U.S. Even if Petitioners were to get a judgment in Turkey, they would then have to enforce it in the United States, where Respondents live and where their assets are located. Respondents would vigorously oppose such enforcement leading to a new round of U.S. litigation involving the same issues as the Maryland case.

Indeed, this Court has emphasized the duty of the federal courts to exercise the jurisdiction given to them. *Quackenbush*, 517 U.S. at 707. *See also, Colorado River*, 424 U.S. at 817. This Court further held that without a final judgment from another court, surrender of jurisdiction is justified only under exceptional circumstances. *Moses H. Cone*, 460 U.S. at 25-26. Federal courts have recently looked to *Colorado River* and *Moses H. Cone* to allow parallel litigation in the U.S. and abroad. *See Euromarket Designs, Inc. v. Crate & Barrel Limited*, 96 F. Supp. 2d 824 (N.D. Ill. 2000). There the federal court refused to stay the Illinois case without clear justification to surrender jurisdiction:

> Because Plaintiff has brought similar actions against the Defendant in Ireland and the United Kingdom, Defendant argues that this case should be stayed to preserve judicial economy and to avoid piecemeal litigation. The Court finds these arguments unpersuasive and declines to stay the proceedings.
>
> "Federal courts have a 'virtually unflagging obligation to exercise the jurisdiction given to them.'" (quoting *Moses H. Cone* and *Colorado River*). Only under "rare" and "exceptional circumstances" providing the "clearest of justifications" should a federal court consider surrendering this jurisdiction. (citations omitted).

Euromarket Designs, Inc. v. Crate & Barrel Ltd., 96 F. Supp. 2d at 842.

These jurisdictional issues are important because surrender of jurisdiction absent a final judgment from another court, as occurred in this present case, raises implications with respect to Petitioners' due process rights

under the Fifth and Fourteenth Amendments. As articulated in *Dooley v. United Technologies Corp.*, 803 F. Supp. 428, 440 (D.D.C. 1992), "[I]f a court finds the assertion of jurisdiction is appropriate, international comity concerns must either be minimal or outweighed by other factors" and "[o]nce a foreign defendant is found to be under the jurisdiction of a U.S. court, concerns about international comity are limited." This point is particularly salient in this present case because the lower court stated that its international comity and *forum non conveniens* dismissals obviated the need for a ruling on jurisdiction. (App. 7).

Federal courts should tread carefully in using the doctrine of international comity to dismiss cases where personal jurisdiction otherwise exists.[2] In this case, in particular, because of problems with the Turkish court, Petitioners could end up having no forum at all in which to adjudicate their claims. Professor Louise Weinberg warned of this danger when she wrote, "Comity in the international case means, in essence, that even those plaintiffs who can survive jurisdiction and *forum non conveniens* challenges in our courts could be denied the benefit of rationally applicable American law. Reciprocal comity could mean that they could be denied systematically the benefit of any law."[3]

This present case raises the real danger that comity could push aside due process. The situation in this case is the reverse image of *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), and *World-Wide*

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[2]This case also implicates the venue statutes as enacted by Congress, specifically 28 U.S.C. §1391(d), wherein Congress has decreed that "an alien may be sued in any district." Respondents claim that they are aliens and that their only residence is in Turkey. Since Congress has set the venue for aliens in any district, a question here is whether the courts can use such extra-Constitutional common law doctrines as international comity and *forum non conveniens* to alter such legislation.

[3]Louise Weinberg, *Against Comity*, 80 Geo. L.J. 53, 73 (1991).

Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980). In those cases, this Court concerned itself with the due process rights of the defendants to avoid being "haled into court" in a forum where they had few contacts. In this present case, the common law doctrines of comity and *forum non conveniens* have been used to cut off the due process rights of plaintiffs in the forum where they reside and where the injury occurred. This Court should be equally concerned about the due process rights of such plaintiffs.

II. *Quackenbush* extends to dismissal of an action for damages on international comity grounds because of first-filed parallel foreign litigation.

A. Federal courts differ on whether *Quackenbush* can apply where the parallel litigation is in another country.

In the federal/state context *Quackenbush* held that a federal court could abstain from exercising jurisdiction only where the requested relief is equitable in nature. 517 U.S. at 718. Petitioners argued in briefs to the district and circuit courts that this case cannot be dismissed because *Quackenbush* also applies to parallel international litigation. The relief requested here was not equitable in nature but rather for damages. Had the lower court followed *Quackenbush* this case could not have been dismissed on international comity grounds.

Since the *Quackenbush* decision, U.S. courts have split as to whether *Quackenbush* applies in an international context. U.S. courts have been provided with no uniform standard or guidance as to how they should approach cases where parallel litigation is pending overseas. This lack of guidance results in uncertainty for the litigants, the practitioners and the courts. As Born and Westin point out in their standard treatise on international civil litigation, federal courts have "relatively little direct statutory or

constitutional guidance" due to conflicting common law doctrines.[4] These common law doctrines include notions of international comity, *forum non conveniens* and the "first-to-file rule." The question of which doctrine to be applied in the case of parallel litigation is an issue yet to be resolved by the federal courts.

As highlighted by Louise Ellen Teitz, a respected academic who specializes in international litigation, where parallel U.S. and foreign litigation is concerned, "federal courts ruling on motions to stay or dismiss have reached inconsistent results based on completely different understandings of the broad concept of comity."[5] In dealing with simultaneous litigation in more than one country some U.S. courts will allow the parallel litigation to continue until one of the forums reaches a judgment, which can be raised as *res judicata* in the other.[6] Other courts will abstain by applying *Quackenbush* or some other doctrinal framework on an international basis in order to stay the domestic litigation pending the conclusion of the foreign proceeding. Yet other courts will dismiss the U.S. litigation based on the

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[4]Born & Westin, International Civil Litigation in United States Courts, at 319 (2d ed. 1992).

[5]Louise Ellen Teitz, *Parallel Proceedings: Treading Carefully*, 32 Int'l L. 223, 224 (1998). In this article she quotes another commentator who characterizes international comity as "an amorphous never-never land . . . " Harold Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 Am. J. Int'l L. 280, 281 (1982). Prof. Teitz also observes with regret, "the continuing trend of courts to approach the issues of antisuit injunctions, motions to dismiss, and motions to stay as distinct problems, rather than different responses to the same problem that should be viewed within one jurisprudential and precedential unit." Transnational Litigation, at 43 (Cum. Supp. 1999)

[6]Professor Teitz points out in her textbook on international litigation that this is the general approach in United States courts to litigation in multiple forums. Louise Ellen Teitz, Transnational Litigation, at 236 (1996). Petitioners argued to the Fourth Circuit that this should be the position it should adopt.

broad concept of international comity, for example, the Eleventh Circuit, and the court in this present case.

The confusion among the federal courts can be illustrated by several recent cases involving parallel litigation pending overseas. Federal courts have very recently taken directly opposing positions when dealing with the issue of applying *Quackenbush* abstention to parallel litigation overseas. As noted in 1999 by the court in *Goldhammer v. Dunkin Donuts*, 59 F. Supp. 2d 248, 252 (D. Mass. 1999):

> "Still open is the question whether the federal courts have the power to dismiss an action for damages because of parallel foreign litigation. In the abstention context involving parallel state proceedings, federal courts have power to dismiss or remand cases only where relief being sought is equitable or otherwise discretionary, but they may not do so in common law actions for damages. *See Quackenbush*, 517 U.S. at 719-22, 116 S. Ct. 1712. The rationale of *Quackenbush* is that damage actions, unlike suits for equitable relief, do not invoke the court's equitable discretion."

The *Goldhammer* court emphasized the split in the U.S. courts by highlighting the Eleventh Circuit's conclusion in *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209, 1223 (11th Cir. 1999), that *Quackenbush* did not extend to cases raising the abstention issue where parallel international litigation was involved. In contrast – *Goldhammer* pointed out - the court in *Abdullah Sayid Rajab Al-Rifai & Sons v. McDonnell Douglas*, 988 F. Supp. 1286, 1290-91 (D. Mo. 1997), specifically applied *Quackenbush* abstention based on pendency of a foreign action.

Most recently, the Seventh Circuit, in *ARA International, Inc. v. Nimelias Enterprises S.A., Vancances*

Heliades, and Princess Airlines S.A., 250 F.3d 510, 518 (7th Cir. 2001), addressed the issue of abstention in the case of parallel foreign proceedings in terms of *Colorado River* abstention as extended by *Moses H. Cone Mem'l Hospital.* 460 U.S. at 25-26 (noting that the court must find "exceptional circumstances" to justify the surrender of the court's jurisdiction). See also, the Tenth Circuit's opinion *In re. Viktor Kozeny*, 236 F.3d 615, 618 (10th Cir. 2000), where that court stated that the same *Moses H. Cone* principles govern parallel federal and international court proceedings. The Second Circuit also recently entered the fray when it cited *Quackenbush* in *767 Third Avenue Assocs. v. Consulate General of Socialist Federal Republic of Yugoslavia*, stating, "as the district court correctly noted the Supreme Court has held that when federal courts apply such abstention principles they may enter a stay, but are usually not permitted to dismiss the action altogether if the action is for money damages." 218 F.3d 152, 163 (2d Cir. 2000). The action in this present case is for money damages.

Earlier cases also illustrate the federal courts confusion with respect to parallel litigation. For example, in *Neuchatel Swiss General Ins. Co. v. Luftansa Airlines*, 925 F.2d 1193 (9th Cir. 1991), the Ninth Circuit allowed both cases to go forward finding that there were "no exceptional circumstances justify[ing] abstention" in a case involving parallel litigation in Switzerland noting that some duplication of judicial effort is the inevitable price of preserving access to federal relief. *Id.* at 1195. In contrast, other pre-*Quackenbush* cases imposed stays on the U.S. litigation pending the outcome of the foreign lawsuits, for example, *Ingersoll Milling & Machinery Co. v. Granger*, 833 F.2d 680, 685 (7th Cir. 1987) (referring to *Colorado River* abstention, but upholding a stay) and *Boushel v. Toro*, 985 F.2d 406 (8th Cir. 1993) (holding that abstention was appropriate where the other litigation was in Canada).

The Eleventh Circuit laid down its own approach to the problem of parallel international litigation in *Turner Entertainment Corp. v. Degeto Film GmbH*, 25 F.3d 1512 (5th Cir. 1994), where it stayed the U.S. proceedings pending outcome of the parallel German litigation recognizing "international abstention" as an independent doctrine based on international comity (not derived from any related domestic abstention doctrine such as *Colorado River* abstention). After the Supreme Court's *Quackenbush* decision, the Eleventh Circuit re-visited the issue of parallel litigation in *Posner v. Essex Ins. Co.* but stood firm on its *Turner Entertainment* analysis resisting the urge to extend federal/state jurisdictional concepts to the international arena. The *Posner v. Essex* decision applied the factors set out in *Turner* specifically declining to extend *Quackenbush* where parallel international litigation is involved noting that domestic abstention doctrines are inapplicable to relationships between federal courts and foreign nations. 178 F.3d at 1224.

B. The court improperly applied the "first-filed" rule and *res judicata* in its comity decision.

Not only did the lower court fail to apply the *Quackenbush* rule correctly in its international comity decision, but also the court incorrectly applied the "first-filed" rule. The Maryland federal court concluded that "international comity" required a dismissal in deference to the case "filed first in Turkey." (App. 17).

To apply the "first-filed rule" to this case contravenes this Court's decision in *Princess Lida of Thurn and Taxis v. Thompson*, 305 U.S. 456, 465-66 (1939), holding that the first-filed rule only applies to *in rem* actions. In addition, the Third Circuit pointed out that the first-filed rule has never been applied, "and in fact it was never meant to apply where

the two courts involved are not courts of the same sovereignty." *Compagnie Des Bauxites de Guinea v. Ins. Co. of N. Am.*, 651 F.2d 877, 887, n.10 (3rd Cir. 1981).

The lower court here based its decision to dismiss, in part, on Petitioner's statement in its brief that there would be no conflict between a Turkish court decision and a U.S. decision because the first decision could be pled as *res judicata* in the second court. (App. 9). The court characterized Petitioner's explanation of the law with respect to *res judicata* as an "admission" that Turkish law, therefore, applies to the Maryland case. The Second Circuit held exactly the opposite on this issue in *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987), as has the D.C. Circuit in *Laker Airway v. Sabena, Belgian World Airways,* 731 F.2d 909, 926- 927 (D.C. Cir. 1984). Both of these circuits allow concurrent lawsuits in the U.S. and abroad reasoning – as per Petitioners's *res judicata* statement here - that the doctrine of *res judicata* will forestall inconsistent decisions. The Maryland federal court's misunderstanding of the relationship between comity, concurrent jurisdiction, the "first-filed rule" and *res judicata* in the context of parallel litigation overseas illustrates the need for this Court's guidance in these areas.[7]

As a result of the confusion in the circuits with respect to the application of these principles, this Court should accept *certiorari* to clarify when courts should apply *Quackenbush,* the "first-filed rule" and *res judicata* in cases involving international comity and parallel litigation.

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[7]This is particularly important in this case where Petitioners will be unable to enforce any Turkish judgment in Turkey because Respondents and their assets are in the United States.

III. Under *Gilbert* and *Piper* a U.S. resident is not foreclosed from suing in his home forum primarily for the reason that a parallel lawsuit is in progress overseas in a case where all parties were U.S. residents, where the law to be applied was local law and where the injury occurred in the forum.

The lower court here repeatedly emphasized the fact that a parallel lawsuit was underway in Turkey and based both its international comity and its *forum non conveniens* decision to dismiss primarily on that ground. (App. 12). While the court went through a cursory analysis of the *Gilbert* factors, it continually returned to the lawsuit in Turkey and analyzed the *Gilbert* factors primarily in the light of the on-going Turkish lawsuit. (App. 8-13). The result of the lower court's decision applied broadly would be to render *Gilbert* and *Piper* nullities where there is a parallel suit overseas.

The court's emphasis on the parallel case underway in Turkey as the basis for its decision is inapposite with this Court's cautionary language in *Piper*:

> [This Court's earlier *forum non conveniens* decisions] have repeatedly emphasized the need to retain flexibility. In *Gilbert,* the Court refused to identify specific circumstances "which will justify or require either grant or denial of remedy." 330 U.S., at 508, 67 S.Ct., at 843. Similarly, in *Koster*, the Court rejected the contention that where a trial would involve inquiry into the internal affairs of a foreign corporation, dismissal was always appropriate. . . . [I]f central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.

Piper Aircraft Co. v. Reyno, 454 U.S. at 249.

Thus, the lower court's reliance on the Turkish litigation to justify its decision to dismiss places the central emphasis on this single factor in direct conflict with the Supreme Court's rulings in *Koster* and *Piper* and with the Second Circuit's recent decisions in *Guidi v. Intercontinental Hotels Corp.*, 303 F.3d 180 (2d Cir. 2000), and *DiRienzo v. Philip Services Corp.*, 232 F.3d 49 (2d Cir. 2000). The Second Circuit emphasized this point in *DiRienzo*, "As we noted in *Guidi*, the existence of related litigation is not one of the factors enumerated in *Gilbert*. See 203 F.3d at 185." 232 F.3d at 62. The lower court here, by grafting on to *Gilbert* and *Piper* a new factor involving the existence of related litigation overseas, impermissibly extends *Gilbert* and *Piper*. As the Second Circuit clearly underscores in both *DiRienzo* and *Guidi*, *Gilbert* and *Piper* did not take into account as a factor - either for or against retention - whether a parallel lawsuit is on-going overseas. By rejecting out-of-hand any other relevant considerations - such as the requirements of Maryland law - the lower court here violated this Court's *Gilbert*, *Koster* and *Piper* directives regarding the need to retain flexibility.[8]

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[8]The court also rejected out-of-hand any allegations of corruption in the Turkish courts, not even allowing discovery on this issue. Such a rejection looks only to defendants' convenience and sets the focus as the optimal forum for defendants. Defendants' optimal forum is in Turkey where they can use their political and other influence to control the "progress" of the Turkish case. For example, in the latest Turkish hearing on June 15, 2001, the Turkish court convened but could not conduct its business because it is waiting for a report of an independent panel of experts. One of the three members of the expert panel was traveling in the U.S. and was not available to sign the panel's report. Thus all the Turkish court could do was to postpone the hearing until October 24, 2001 after its Summer recess. While Turkey may be the "optimal" forum for defendants, this should not be the focus of the U.S. court's *forum non conveniens* analysis, as the Ninth Circuit recently pointed out in *Ravelo Monegro v. Rosa*, 211 F.3d 509, 514 (9th Cir. 2000).

A. The lower court departed from *Koster* and *Piper* regarding heightened deference for resident plaintiffs.

This Court held in *Koster* that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen his home forum, "[A] real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." 330 U.S. at 524. See also, *Piper*, 454 U.S. at 255-56. The opinion below, which was summarily affirmed by the Fourth Circuit, failed to give any deference to the fact that Petitioners were Maryland residents suing in their home forum. The decision below, which relied solely on the *Gilbert* factors, was resoundingly silent on the *Koster* deference standard. This Court should re-affirm the deference standard articulated in *Koster* and extend even higher deference in cases where, as here, both the plaintiffs and defendants are U.S. residents.[9]

The court's decision here not only departs from *Koster* with respect to the deference owed to plaintiffs, but is also in stark contrast with a trio of *forum non conveniens* decisions emanating from the Second Circuit in the year 2000 – *Guidi*, *DiRienzo*, and *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *cert. denied* 121 S. Ct. 1402 (2001). In each case the Second Circuit reversed lower court decisions which failed to give

[9]The district court's additional failure to give any weight to the U.S. residence of the Respondents is in conflict with the D.C. Circuit's opinion in *Founding Church of Scientology v. Verlag*, 536 F.2d 429, 435 (D.C. Cir. 1976), which found it to be "of great significance" that *both* plaintiffs and defendants were U.S. residents and that the damages occurred in the United States. Similarly, in *Reid-Walen v. Hansen*, 933 F.2d 1390, 1394-96 (8th Cir. 1991), the Eighth Circuit emphasized the importance of giving proper weight to the fact that both plaintiffs and defendents were U.S. residents.

heightened *Koster* deference to the U.S.-resident plaintiffs.[10] The Second Circuit specifically pointed out in a footnote to the *DiRienzo* decision that its *Guidi* and *Wiwa* decisions were not limited to their facts. 232 F.3d at 62, n. 2. The circuit court noted that in *Guidi* it would have found in the plaintiffs' favor in any event even absent the unusual emotional burden on plaintiffs if they were required to join the ongoing Egyptian lawsuit. *Id.* The Second Circuit continued, "Nor is the analysis in *Wiwa* based on the particular facts of that case either. Rather, the opinion notes that when deciding a motion to dismiss under *forum non conveniens* our case law and that of the Supreme Court have established a rule of deference to a U.S. forum for a U.S. resident plaintiff. *See* 226 F.3d at 102." *Id.*

The Second Circuit *DiRienzo* decision articulated the importance of correcting the lower court's error with respect to deference. "In sum, the district court erred in both *DiRienzo* and *Liff* [the companion case] by giving less deference to the plaintiffs' choice of forum and by failing to accord proper significance to the choice of a U.S. forum by

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[10]In *Iragorri v. United Technologies*, 243 F.3d 678 (2d Cir. 2001), a panel of the Second Circuit also vacated and remanded the district court decision granting a *forum non conveniens* motion. The panel invited the district court to reconsider its dismissal in light of the *Wiwa*, *Guidi* and *DiRienzo* decisions regarding the amount of deference to be given to the plaintiff's choice of forum. The Second Circuit heard *sua sponte* oral argument on June 6, 2001on the issue of how much deference should be given to a plaintiff who does not live in the forum. In contrast, the First Circuit considered the same case against a different corporate defendant in *Iragorri v. International Elevator, Inc.*, 203 F.3d 8 (1st Cir. 2001). There the First Circuit issued an exactly opposite opinion to the Second Circuit panel, failing to give any deference whatsoever to the Iragorris who are U.S. citizen plaintiffs suing in the United States but outside their home state of Florida. These two conflicting circuit court opinions in parallel cases **involving the same plaintiffs and the same facts** clearly illustrate the need for Supreme Court guidance on the issue of *forum non conveniens* in general and, more specifically, on the question of how much deference should be shown to a U.S.-based plaintiff.

the American plaintiffs. The district court abused its discretion by allowing these errors to infect its *Gilbert* analysis." *Id.* at 67. So too, did the lower court here allow its failure to grant proper deference to the plaintiffs' choice of forum to infect its *Gilbert* analysis especially with respect to the interest of Maryland, the forum state.

B. The failure to grant *Koster* deference to plaintiffs infected the court's *Gilbert* analysis.

In *DiRienzo* the Second Circuit found that the district court's erroneous understanding of the facts central to a case can preclude a reasonable balancing of the *Gilbert* factors. 232 F.3d at 65. There the district court dismissed on a finding that the lawsuit primarily concerned the conduct of a corporation in Canada notwithstanding the involvement of some American entities and persons. The Second Circuit overturned because the lower court failed to focus on the impact of the Canadian corporation's fraud on the American parties. *Id.* at 64-65. Here, the district court similarly failed to focus on the impact of the Respondents' actions on the American Petitioners in Maryland.

The Second Circuit in *DiRienzo* referenced a similar situation in *R. Maganlal v. M.G. Chemical Company, Inc.*, 942 F.2d 164 (2d Cir. 1991), where the district court failed to identify the fundamental legal issue in the American lawsuit. As a result, the district court "erred in concluding that issues of Indian law and access to witnesses in India were central to resolving the case. . . this error tainted the court's entire *forum non conveniens* analysis." *Id.* at 168. *See also Overseas Programming Cos., Ltd. v. Cinematographische Commerz-Anstalt*, 684 F.2d 232, 235 (2d Cir.1982) (holding that the district court erred in its balancing of the *Gilbert* factors because it "failed to identify the basic issue in the lawsuit").

1. The lower court failed to identify the basic issue in the lawsuit.

The court here completely misidentified the fundamental issue of the case - Respondent's failure to repay the loans at issue in the Maryland complaint to the Maryland plaintiffs.[11] The allegations of the Maryland complaint contained counts for breach of fiduciary duty (for failure to repay the loans), conversion (of the loan money); unjust enrichment (from the loan money); breach of contract (to repay the loans) and money had and received (the loan money). Despite the clear allegations of the complaint implicating Maryland law and stressing the impact of the tortious behavior on the Maryland plaintiffs, the district court held that this case solely implicated Turkish law and the internal workings of a Turkish corporation. (App. 11-12).

The district court's misunderstanding of the legal issues and the facts skewed the court's *Gilbert* analysis regarding access to proof and witnesses. Like the lower courts in *R. Maganlal* and *DiRienzo*, the court in this present case misidentified the central issue in the case leading to the wrong conclusion that issues of foreign law and access to witnesses and documents in the foreign country were central to resolving the case. The district court erroneously found that proof of Petitioners' allegations here would largely involve Turkish foreign-language documents created in Turkey (App. 9-10) as opposed to the correct conclusion that

[11]The lower court erroneously characterized the case as involving parking lots in Turkey (App. 11).

proof of non-payment of the Maryland loans is to be found in the books and records of the Maryland company.[12]

The district court here applied none of Maryland's conflicts of law rules to any of the counts in the Maryland complaint to ascertain which country's law would apply to the issues in this case. Maryland's choice of law rules require Maryland law to be applied to this case. [13] The Ninth Circuit spoke to the choice of law question in *McGhee v. Arabian American Oil Co.*, 871 F.2d 1412, 1422 (9th Cir. 1989), "the burden is on the party seeking to invoke foreign law." *See also*, *MRO Communications, Inc. v. AT & T Corp.*, 197 F.3d 1276 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1995 (2000), and *Magellan Real Estate Inv. Trust v. Losch*, 109 F. Supp. 2d 1144, 1155 (D. Ariz. 2000) (holding that the

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[12]The district court here found that proof of the loan payments and financial mismanagement "would largely involve Turkish-language documents created in Turkey (App. 10). The judge ignored the fact that under Maryland law proof of the loan payments would be on the books of the Maryland plaintiff and that the plaintiffs submitted an affidavit stating that they commissioned an English-language audit from a major international accounting firm which proved defendants' financial mismanagement of the loan proceeds. In fact, Petitioners argued to the lower court that all of the **relevant** evidence in the Maryland case was originally written in English.

[13]Maryland law on breach of a promise to pay - the central issue in the Maryland complaint - is that the breach occurs where the debt was payable, *Kane v. Schulmeyer*, 708 A.2d 1038 (1998). The law in Maryland regarding the other torts is the same, that is, the cause of action arises where the wrongfully deprived person resides. *See e.g., B & O v. Equitable Bank*, 550 A.2d 407, 410 (1998) (holding that the gist of a conversion is not the acquisition of the property by the wrongdoer, but the wrongful deprivation of a person of property to the possession of which he is entitled). Where tort claims are concerned, Maryland adheres to the law of *lex locus delecti* – the law to be applied is that law of the forum where the injury occurred, *Grodinsky v. Fairchild Industries, Inc.*, 507 F. Supp. 1245, 1252 (D. Md. 1981). For the contract and quasi-contract claims, Maryland follows the principle of *renvoi, Rouse Co. v. Federal Ins. Co.*, 991 F.Supp. 460, 463 (D. Md. 1998). Under this principle courts of the forum state apply the substantive law of the forum state where the forum state has a substantial relationship with respect to the particular contract issue presented in the litigation. *Id.*

applicable choice of law principles are those of the forum state). Certainly, the Maryland court here failed to put the burden on the Respondent who was seeking to apply Turkish law to the counts of the Maryland complaint. Rather, the court stated that because the Petitioners couched their Turkish allegations under Turkish law, the same would automatically apply in a Maryland court regardless of the requirements of Maryland law. (App. 11).

This case is similar to *Prevision Integral de Servicios v. Teresa Kraft*, 94 F. Supp. 2d 771, 779 (W.D. Tex. 2000), where the court did not agree with the defendant that Mexican law controlled the case just because the contract involved the parties' activities in Mexico. Likewise, in *Norcold v. Greg Lund Products, Ltd.*, 109 F. Supp. 2d 819, 829 (S.D. Ohio 2000), the court concluded that the Ohio lawsuit was not governed by Canadian law simply because the overall distribution agreement between the parties was for the distribution of goods in Canada. The court in *Euromarket Designs Inc.*, 96 F. Supp. 2d at 843, explained that allowing simultaneous lawsuits in the U.S. and abroad does not allow or encourage piecemeal litigation simply because the plaintiff alleged a justiciable claim in the U.S. and at the same time a justiciable claim in the foreign jurisdiction under that country's laws.[14]

Here, the lower court failed to take into account Maryland law or to identify the basic issues in the case thus infecting the court's entire *Gilbert* analysis. This case is illustrative of the need for the Supreme Court to provide guidance to the federal courts on the role of the law of the forum in the case of parallel international litigation.

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[14]The lower court in this present case opined that plaintiffs would be impermissibly "splitting the claims" if the court allowed the case to go forward in Maryland based on Maryland law at the same time the Turkish case is being adjudicated in Turkey under Turkish law. (App. 11).

2. The court's opinion departs from this Court's direction in *Piper* and *Van Cauwenberghe* to scrutinize the substance of the dispute.

This Court in *Van Cauwenberghe v. Baird*, 486 U.S. 517, 528 (1988), directed courts in their *Gilbert* analysis to "scrutinize the substance of the dispute between the parties to evaluate what proof is required, and determine whether the pieces of evidence cited by the parties are critical, or even relevant, to the plaintiff's cause of actions and to any potential defenses to the action." *Van Cauwenberghe* further required the lower courts to "consider the locus of the alleged culpable conduct, often a disputed issue, and the connection of that conduct to the plaintiff's chosen forum. *Cf. Piper Aircraft v. Reyno*, 454 U.S. 235, 259-260 (1981)." *Id.* The *Gilbert* factors "make clear that in assessing a *forum non coveniens* motion, the district court generally becomes entangled in the merits of the underlying dispute" and "we believe that in the main, the issues that arise in *forum non conveniens* determinations will substantially overlap factual and legal issues of the underlying dispute . . . ." *Id.* This principle was recently emphasized in a case in Arizona where the court highlighted the importance of identifying the central factual issues in the U.S. case so that the appropriate witnesses and documents relating to those U.S. issues could be identified for purposes of applying the *forum non conveniens* factors. *Magellan Real Estate Inv. Trust v. Losch*, 109 F. Supp. 2d at 1152-1154.

The lower court here refused to consider the merits of the underlying dispute in the Maryland complaint including the locus of the alleged culpable conduct.[15] In addition, the court also refused to grant the *forum non conveniens* discovery requested by Petitioners to determine the exact locus of the culpable conduct. (App. 8).[16] To the extent that *Van Cauwenberghe* requires the court to scrutinize the substance of the dispute between the parties, that decision should be extended to require a minimal level of *forum non conveniens* discovery.

This year an Indiana court confronted this exact issue in the case *In Re Bridgestone/Firestone, Inc. ATX, ATXII*, 131 F. Supp. 2d 1027 (S.D. Ind. 2001), where the defendants filed a *forum non conveniens* motion to dismiss on the grounds that the product liability lawsuits belonged in Colombia and Venezuela where the injuries occurred. The court quoted *Van Cauwenberghe* and noted that its task was to consider no less than ten public and private interest factors concluding, "This rather daunting task is hardly one to be

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[15]The affidavits in the present case showed that the defendants purchased a house in the State of Washington in 1996 and resided in Boston prior to the house purchase. (App. 36-37). Both the individual defendants and the corporate defendant had bank accounts at Fleet Bank when the Respondents resided in Boston prior to their move to Washington State. (App. 37). Thus, the defendants were located in the United States at the time that they failed to re-pay the Maryland loans and at the time that they violated their fiduciary duty to plaintiffs by failing to re-pay the loans as alleged in the complaint. (App. 36-37).

[16]In requesting *forum non conveniens* and jurisdictional discovery, the Petitioners argued in their brief to the district court that they needed discovery relating to: the deference issue (the residence of the Respondents); whether Respondents' tortious conduct occurred in the United States; whether the Turkish corporate defendant had a U.S. address and bank account; whether the controversy is a "localized controversy" in *Gilbert* terms; and whether and the extent to which the Turkish court has been subject to improper influence. The district court stated that "the areas [for discovery] proffered by Plaintiffs are essentially irrelevant" to the *forum non conveniens* decision. (App. 8).

undertaken without adequate information. Therefore, it behooves courts to permit discovery on facts relevant to *forum non conveniens*." *Id.* at 1029-30.

In view of the jurisdictional and due process issues discussed herein, this Court should clarify the extent to which jurisdictional and *forum non conveniens* discovery should be allowed by a federal court in the case of parallel litigation overseas.

CONCLUSION

The Maryland court's misunderstanding of the relationship between comity, concurrent jurisdiction, the "first filed" rule, and *res judicata* in the context of parallel litigation overseas is illustrative of similar widespread misunderstanding and misapplication of these doctrines throughout the federal court system. This case further illustrates the widespread misunderstanding of the correct standard to be applied to a motion for dismissal on the ground of *forum non conveniens*. This misconception was recently elucidated by the Ninth Circuit, "[R]ather than treating *forum non conveniens* as an exceptional tool to be employed sparingly, the district court perceived it as a doctrine that compels plaintiffs to choose the optimal forum for their claim." *Ravelo Monegro v. Rosa*, 211 F.3d at 514. The Ninth Circuit is correct, the U.S.-based plaintiffs need not choose the optimal forum for their claim, only one that comports with due process and jurisdictional requirements.

As observed by a commentator on the doctrine, while *forum non conveniens* has served as a docket clearing mechanism to some extent:

> It has also lengthened litigation, cast yet another doubt upon the validity of plaintiff's choice of forum, and at times excused sloppy jurisdiction analyses. The factors and policies to which the doctrine calls

> the court's attention are certainly relevant and important, but they are best considered in the jurisdictional context. There is no valid continuing role for *forum non conveniens*, only a repetitive one. The doctrine should be abolished."[17]

Ironically, *forum non conveniens* is no longer used in Scotland (the common law doctrine's homeland) since the United Kingdom's accession to the European Union. The Brussels Convention took away the common law judges' discretion to limit their jurisdiction through the use of *lis alibi pendens*, *forum non conveniens* or comity.[18] Similarly, in the United States, the common law doctrines of international comity and *forum non conveniens* must be viewed through the prism of the Due Process Clause. They should have no independent ultra-Constitutional, extra-jurisdictional existence without the protections enshrined in our enabling legal framework.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,
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[17]Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 Cal. L. Rev. 1259, 1324 (1986).

[18]Brian Pearce, *The Comity Doctrine as a Barrier to Juridical Jurisdiction: A U.S.-E.U. Comparison*, 30 Stan. J. Int'l L. 525, 537 (1994).

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1552

JOEL S. MEISEL; NEW WORLD PARKING, INCORPORATED; WORLDWIDE PARKING INCORPORATED,
Plaintiffs - Appellants,

Versus

BESIR KEMAL USTAOGLU; HASIBE USTAOGLU; REPIMEKS DIS TICARET LIMITED SIRKETI,
Defendants - Appellees.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Alexander Williams, Jr., District Judge. (CA-98-3863-AW)

Submitted: January 31, 2001
Decided: March 6, 2001
Entered: March 6, 2001

Before WILKINS and LUTTIG, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Catherine E. Bocskor, Rockville, Maryland, for Appellants. Steven A. Hammond, HUGHES, HUBBARD & REED, L.L.P., New York, New York; Robert M. Kennedy, HUGHES, HUBBARD & REED, L.L.P., Washington, D.C., for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Joel Meisel, New World Parking, Inc., and Worldwide Parking, Inc., appeal the district court's order dismissing this action on the grounds of forum non conveniens and international comity. We have reviewed the record and the district court's opinion and find no reversible error. Accordingly, we affirm on the reasoning of the district court. See Meisel v. Ustaoglu, No. CA-98-3863-AW (D. Md. filed Mar. 31; entered Apr. 4, 2000). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Entered: March 31, 2000

At Greenbelt
Clerk U.S. District Court
District of Maryland

JOEL S. MEISEL, et al., :
Plaintiffs, :
:
v. **Civil Action No. AW-98-3863**
:
BESIR KEMAL USTAOGLU, et al.,:
Defendants. :

ORDER

For the reasons stated in the Memorandum Opinion dated March 31, 2000, IT IS this 31st day of March, 2000, hereby ORDERED:

1. That Plaintiffs' Motion for Discovery on Jurisdictional Issues [20-1]BE, and the same hereby IS, **DENIED**;
2. That Defendant's Motion to Dismiss Or, In the Alternative, Stay Proceedings [19-1]BE, and the same hereby IS, **GRANTED**;
3. That the Clerk of the Court **CLOSE** this case;
4. That the Clerk of the Court mail copies of this Order to all counsel of record.

/s/_____
Alexander Williams Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

Entered: March 31, 2000

At Greenbelt
Clerk U.S. District Court
District of Maryland

JOEL S. MEISEL, et al., :
Plaintiffs, :
:
:
v. **Civil Action No. AW-98-3863**
:
:
BESIR KEMAL USTAOGLU, et al.,:
Defendants. :

MEMORANDUM OPINION

I.

Pending before the Court is Defendants' Motion to Dismiss or Stay [19-1], and Plaintiff's Motion for Limited Discovery on Jurisdictional Issues [20-1]. This is the second civil action the Plaintiffs have filed against these Defendants. The first case was brought in Turkey and has been proceeding before a Turkish court over the past three years. The arguments have been fully briefed. No hearing is deemed necessary. See Local Rule 105.6. For the reasons stated below, the Court will grant Defendants' Motion to Dismiss.

II.

Plaintiffs currently have a case proceeding in a court in Turkey, in addition to the complaint filed in this Court. In September 1996, Plaintiffs brought their original lawsuit against defendants Repimeks Dis and Besir Kemal Ustaoglu in the 4th Commercial Court in Istanbul, Turkey. Two years later, in November 1998, Plaintiffs filed a Complain in this Court. In December 1999 and January 2000, Plaintiffs perfected service on Defendants. Because the factual basis for both cases is virtually identical, the Court will examine the underlying facts of the parties' disputes together in this section.

This case involves a foreign joint venture to establish parking operations in Turkey. The Plaintiffs are Joel S. Meisel, New World Parking and Worldwide Parking of Montgomery County, Maryland. The Defendants are Besir Kemal Ustaoglu, Hasibe Ustaoglu, and Repimek Dis Taceret Limited Sirketi of Istanbul, Turkey. See Plaintiffs' Complaint at 1. Plaintiffs now contend that the Ustaoglus, while Turkish citizens, are also residents of the United States, that they have bank accounts here, and that one has a social security number. The court accepts Plaintiffs' version of their status as true.

The parties initially signed a Memorandum of Understanding in 1993, and then signed a formal Protocol in January 1995, to govern their joint parking operations venture in Turkey. The negotiations for these documents occurred when Besir Ustaoglu visited Maryland and when Joel Meisel was in Turkey, and through phone calls and faxes. The negotiations over the terms of the Protocol were finalized through Mr. Meisel's Turkish attorney and Repimeks Dis. During the negotiations of the Protocol, Mr. Meisel and his business associates traveled to Turkey on a number of occasions to consider the terms of the Protocol, and to make arrangements for their joint venture.

The resulting company--named Repimeks Otopark--is a joint stock company organized under the laws of Turkey. From July 1993 to January 1995, Frederic Caponiti, the Vice President of New World Parking was stationed in Istanbul, Turkey, and worked out of Repimek Dis' offices in Istanbul. In 1994, New World Parking published a private offering memorandum, stating that half of the Plaintiffs' business was involved in Turkey through this joint venture. This offering memoranda featured Ustaoglu as one of the key personnel for the joint venture in Turkey. During this time, loan proceeds were wired from a Maryland bank to Ustaoglu in Turkey, to finance the parking operations in Turkey.

Plaintiffs allege that Defendants never repaid these loans. Plaintiffs further contend that they are legally liable for paying back these funds now. Given this motion does not go to the merits of the case, the Court will not focus on the substantive issues, except as they touch on the motion. Instead, the Court will focus on whether this case should be dismissed in deference to the court proceedings in Turkey.

In September 1996, Plaintiffs brought their original lawsuit against defendants Repimeks Dis and Besir Kemal Ustaoglu in the 4th Commercial Courtin Istanbul, Turkey. Plaintiffs previously attempted to file another case in Turkey, however, the 7th Commercial Court there found that the facts were overlapping with the 4th Commercial Court case, and thus joined it will that case. Plaintiffs now suggest that they are unfamiliar with Turkish law, and contend that the case in Turkey is still in its "investigative phase." Defendants represent that the Plaintiffs' have hired a prominent firm in Turkey, and that the Turkish Court is close to making a dispositive decision. Nonetheless, in November 1998, two years after filing their case in Turkey, Plaintiffs filed a civil action in this Court, and perfected service in December 1999 and January 2000.

III.

Defendants have raised four grounds for granting their Motion to Dismiss or Stay: the doctrine of forum non conveniens, prior action pending/international comity,[1] lack of personal jurisdiction and inadequacy of service of process. The parties have also attached submissions to their briefings, including affidavits and documents. In addition, Plaintiffs have filed a Motion For Limited Discovery on the Juridictional issues, supported by a two-and-a-half page memorandum.

The Court has carefully reviewed the Defendants' and Plaintiffs' briefings. The Court believed that Defendant's motion should be granted based on the doctrine of forum non conveniens and under the principles of international comity. Therefore, the Court will not delve into the more tangled issues of personal jurisdiction and service of process presented in Defendants' motion.

The Supreme Court has afforded district courts with substantial flexibility in evaluating a forum non conveniens motion, nothing that "[e]ach case turns on its facts. "William v. Green Bay & Western R. Co., 326 U.S. 549, 557 (1946). The Supreme Court has further held that a district court's inquiry on forum non conveniens does not mandate an extensive investigation, and that such motions may be resolved on affidavits presented by the parties. See Van Cauwenberghe v. Biard, 486 U.S. 517, 527-28 (4th Cir. 1998); Piper Aircraft Company v. Reyno, 454 U.S. 235, 258 (1981) ("Requiring extensive investigation would defeat the purpose of [the] motion.").

Givens' substantial submissions and the undisputed facts in the record, and because the Court is limiting the scope of Defendants' motion, the Court will deny Plaintiffs'

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[1]The parties quarrel over the precise label for this argument. As the Court notes below, their arguments are responsive to each other, and their arguments can be decided on the merits.

motion for discovery. Plaintiffs proffer the following areas for discovery in their Motion: whether Defendants are U.S. residents; the present location of Defendants' assets, "information as to Ustaoglu's exact relationship to and his role in the company Repimek Dis Taceret would be pertinent to the issue of whether that company is a necessary party to this action;" the amount and nature of contacts with Maryland for the jurisdictional issue; and "the Defendant Ustaoglu's ties to high officials in Turkey...." In light of the Court's decision limiting Defendants' motion, the areas proffered by Plaintiffs are essentially irrelevant.

Therefore, the Court sees no reason to undergo costly international discovery based on these vague proffers. Transunion Corp. v. Pepsico, Inc., 811 F.2d 127 (2nd Cir. 1987); see also Ullah v. Canion Shipping Company, Ltd., 589 F. Supp. 522 (D. Md. 1984) ("The further discovery sought by plaintiffs is not relevant to the subject matter presently before the Court and cannot be reasonably calculated to lead to the discovery of pertinent information.") aff'd in 755 F.2d 116 (4th Cir. 1995). As such, the court will deny Plaintiffs' motion.

A. Forum Non Conveniens

The Supreme Court articulated relevant factors to be balanced when considering whether a case should be dismissed on the grounds of forum non conveniens. See Piper Aircraft Company v. Reyno, 454 U.S. 235, 259-60 (1981). The "private factors" include: the relative case of access to sources of proof; the availability of compulsory process for unwilling witnesses; the cost of attendance of willing witnesses; the possibility of a view of the premises; and other practical problems. The "public factors" to consider include: the interest in having a localized controversy decided at home by jurors with a public interest in the matter; the interest in having a localized controversy decided at home by jurors with a public interest in the

matter; the interest in having the forum familiar with the governing law decide the case; the possibility of issues of conflicts of law or the application of foreign law. This list of considerations is "by no means exhaustive, and some factors may not be relevant in the context of a particular case." See Cauwenberghe v. Biard, 486 U.S. 517, 528 (1988).

In this particular case, the Court believes that Plaintiffs' decision to pursue its case in Turkey for the past three-plus years weighs heavily against changing course and duplicating efforts with a second case in this Court. While Plaintiffs argue that the legal issues may differ depending on the Court, the Plaintiffs really have no basis on which to distinguish this case from the case in Turkey. First, Plaintiffs have outright admitted that the case in Turkey will have res judicata effect on this case. See Plaintiffs' Response at 1. Plaintiffs' Complaint seeks the exact amount in damages in both cases. The factual basis of both cases are identical. The legal theories behind the causes of action are largely indistinguishable.[2] While some of the parties may be dismissed, depending on the law of each jurisdiction, the case begins with essentially the same set of Defendants.

The principles of forum non conveniens counsel against duplicating the parties' efforts and evidence-collecting again in this Court. While the parties characterize the state of the Turkish proceedings differently, certain facts are undisputed. It is undisputed: that Plaintiffs filed a Complaint asserting remedies under Turkish law; that the Turkish proceedings have been underway for over three years, that multiple hearings have been held in the case; that certain matters have been referred to Turkish experts; and that parties have submitted Turkish-language documentary evidence to the Court in Turkey. It is likely that many of these efforts would have to be duplicated in this Court, and may well involve re-translating many of the same

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[2]Plaintiffs contend mainly that Turkey may not recognize one of their legal theories, see infra. Plaintiffs do not contend that Turkey does not recognize most of their claims.

documents. The Court fails to see how starting over in Maryland with a second case could be more convenient for any of the parties.

Plaintiffs now contend that they only filed in Turkey as a "prudential measure," and thus they should have more leeway to file a second action in this court. See Herbstein v. Bruetman, 743 F. Supp. 184, 188 (S.D.N.Y. 1990). The only independent evidence, however, that the Plaintiffs offer to support their purported rationale, however, is a 1990 case which suggests that Turkey may have had a one-year statute of limitations for contract actions at that time.[3] Moreover, in any case, Plaintiffs' "prudential" rationale rings hollow considering Plaintiffs waited for over two years before even filing an action in this Court.

Furthermore, the Supreme Court's Piper-articulated factors also weigh against having this Court hear the case. First, the Court believes that, on the whole, the "private factors" weigh in Defendants' favor. Plaintiffs argue that they would all be called as witnesses, and as residents of Maryland, the costs of traveling to Turkey would be high. At the same time, Defendants have pointed to a number of individuals in Turkey, which would likely be called as witness, not the least of which is the Turkish attorney who drafted most of the documents. At best, this factor is evenly split between both forums. As to ease of access to the sources of proof, the Court believes this factor weighs in Defendants' favor. Even accepting as true Plaintiffs' contention that much of the contract negotiations occurred in Maryland, the "proof" of loan payments and financial mismanagement would largely involve Turkish-language documents created in Turkey. As for "other practical problems," this in encompassed by the costs attendant in duplicating many of the efforts, and so this weighs in

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[3]See Mercier v. Sheraton Intern., 935 F.2d 425 (1990)

Defendants' favor. The other private factors are irrelevant: there does not appear to be any unwilling witness in this case, and a "view of the premises" is unimportant.

As to the public factors, the Court believes that they weigh heavily in Defendants' favor and in favor Turkey. First, Plaintiffs' characterization of this is simply a "localized controversy" is unrealistic considering the case involved a foreign joint venture involving parking lots in Turkey. More importantly, this case would undoubtedly involve difficult conflicts of law issues. Plaintiffs, assuming parallel proceedings could take place, contend that the Turkish Court could simply apply Turkish law and this Court could apply Maryland law. However, this would likely involve the splitting of claims, which the Maryland courts generally prohibit. See Jones v. Speed, 577 A.2d 64, 68 (Md. 1990) ("It is well established that a single cause of action or an entire claim cannot be split up or divided and separate suits maintained for various parts thereof.")

Moreover, Turkish law would likely apply to most of the claims if this Court heard the case. In their Turkish Complaint, Plaintiffs stated unequivocally that Turkish law should apply. Even putting aside Plaintiffs' prior admissions, Maryland choice-of-law points toward Turkish law. See Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941). Here, all indications are that acceptance of the loan agreements occurred in Turkey, and the alleged financial mismanagement and other breaches occurred in Turkey. See Atlantic Richfield Co. v. Sybert, 441 A.2d 1079, 1090 (Md. Ct. Spec. App. 1982). The alleged breach of the Protocol and Memorandum of Understanding involves Turkish law as well. Because Repimeks Dis is a Turkish corporation, Plaintiffs' alter ego claims would be governed by Turkish law. See Stromgberg Metal Works, Inc. v. Press Mechanical, Inc., 77 F.3d 928, 933 (7th Cir. 1996) (holding that "piercing the corporate veil" theories are governed by the law of the state of incorporation"). Thus, the Court would be confronted with various choice and conflicts of law

issues, and would likely have to apply Turkish law for most of the claims. Such problems are important considerations for a court to consider. See Mercier (II) v. Sheraton International, Inc., 981 F.2d 1345, 1357 n.10 (1st Cir. 1992) ("[P]ractical difficulties are likely to be encountered in applying Turkish law to a dispute in American courts by reason of the fact that...and almost no Turkish court decisions are available in English translations."); see also Scottish Air International, Inc. v. British Caledonian Group, PLC, 81 F.3d 1224, 1234 (2nd Cir. 1996) (When deciding a forum non conveniens motion, a court may properly rely on the difficulties attending the resolution of questions of foreign law.").

Finally, Plaintiffs allude to alleged inadequacies with the Turkish legal system and the remedies that it may provide. At the outset, the Court notes that Plaintiffs' concerns lack persuasive force when one considered Plaintiffs' chose Turkey as their original forum. See Caspian Invs. Ltd. v. Vicom Holdings, Ltd., 770 F. Supp. 880, 885 (S.D.N.Y. 1991) ("[A]s [plaintiffs] invoked the jurisdiction of the Irish court in the initial action, [plaintiff] cannot assert that the Irish court will not afford substantial justice to its claims.").

The federal courts of the United States do not serve as the "back-up" forum when Plaintiffs become dissatisfied with their original choice. Most, if not all, of Plaintiffs' new-found concerns could have been readily evaluated before Plaintiffs filed suit. See Brinco Mining Ltd. v. Federal Ins. Co., 552 F.Supp. 1233, 1242 (D.D.C. 1982). ("This Court cannot be concerned if, in hindsight, the plaintiff would now have made a different choice [of forum]."). Plaintiff now contends that some of his theories--most notably his "piercing the corporate veil"--may not be widely recognized in the Turkish courts. However, dismissal on the grounds of forum non conveniens may be granted even though the law applicable in the alternative forum is "less favorable to the

plaintiffs chance of recovery." See Piper Aircraft Co., supra at 250.

Plaintiffs also cite the alleged "poor state of the Turkish judiciary," makes generalizations about "corruption" and "lack of impartiality" in Turkey, and vaguely suggest that defendants may have "ties to high officials in Turkey." However, courts have consistently rejected "conclusory claims of injustice in the foreign forum where it voluntarily agreed to litigate its claims." See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuch Housing Authority., 32 F. Supp.2d 497, 505 (D.R.I. 1999). See also El Fadl v. Central Bank of Jordan, 75 F.3d 668, 678 (D.C. Cir. 1996) (finding State Department report expressing "concerns about the impartiality" of Jordanian courts was not sufficient to show forum was inadequate." Plaintiffs remaining concerns, including whether the Turkish court could make an award in U.S. dollars, are either belied by their own prior admission or arc, frankly, insignificant.

Finally, the doctrine of forum non conveniens has "[p]articular vitality when the more convenient forum is a foreign country rather than another federal district court." See Zinsler v. Marriot, 605 F. Supp. 1499, 1504 (D. Md. 1985). This Court is particulary unwilling to indulge Plaintiffs' preference for parallel proceedings, because of the potential conflicts which could result. For example, in Grodinsky v. Fairchild Industries, Inc., 507 F. Supp. 1250 (D. Md. 1981), this Court dismissed a product liability action under the doctrine of forum non conveniens in large part because related lawsuits were already proceeding in Canadian courts. The court noted the "substantial risk of inconsistent results" with a foreign jurisdiction, which had "substantial contacts" with the incidents in the case. See Grodinsky, 507 F. Supp. at 1250.

Here, Plantiffs have litigated their case against Defendants in Turkey for over three years. To start over in this Court, at this late date, would involve waste and duplication for everyone involved. Moreover, Defendants

have further shown that Turkey was and is the more convenient forum anyway. Therefore, the Court believes that the doctrine of forum non conveniens strongly favors having this case be heard in Turkey.

B. The Principle of International Comity

Defendants argue that, even aside from the doctrine of forum non conveniens, this Court should decline jurisdiction because Plaintiffs instituted Turkish proceedings prior to filing in this Court.[4] Plaintiffs argue that the principles of "comity" allows this Court to hear the case anyway. through parallel proceedings. The Court believes that precisely the opposite conclusion is true: that the principles of comity point toward this Court deferring to the Turkish Judiciary, and dismissing this case.

The Fourth Circuit has defined the principle of international comity as the "recognition which one nations allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws." See Guinness v. Ward, 955 F.2d 875, 883 (4th Cir. 1992) citing Hilton v. Guyot, 159 U.S. 113, 164 (1895). The issue of comity, while often raised alongside forum non conveniens, also involves independent considerations of respect for foreign tribunals. As Judge Sirica explained in Brinco Mining Ltd. v. Federal Insurance Company, 552 F. Supp. 1233 (D.D.C. 1982):

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[4]Defendants have labeled their argument under the "Doctrine of Prior Action Pending." Plaintiffs argue that there is no such doctrine, and cite to the "Principle..[of] Concurrent.

> The rationale for comity dismissals is not based simply on lack of familiarity with the particular foreign law, but rather is in deference to the foreign country's legal, judicial, legislative and administrative system of handling disputes over which it has jurisdiction, in a spirit of international cooperation.

See id., at 1240

The issue of comity frequently arises when a plaintiff files a civil action in a U.S. court while the plaintiff has a previously-filed, identical case proceeding through a foreign jurisdiction. Out of respect for the foreign jurisdiction, and to avoid discord with the judiciaries of other nations, courts in the U.S. will consider whether to defer to the judgment of the foreign tribunal. While articulated in various ways, federal courts in the U.S. frequently consider the following factors: (1) the similarity of the parties and issues involved; (2) the temporal sequence of filing for each action; (3) considerations of fairness and the possibility of prejudice to any of the parties; (4) the adequacy of relief in the alternative forum; and (5) the promotion of judicial efficiency. See Dragon Capital Partners v. Merrill Lynch Capital Services, Inc., 949 F. Supp. 1123, 1127 n. 8 (S.D.N.Y. 1997); see also Caspian Invs. Ltd., 770 F. Supp. at 885.

These factors weigh against this Court taking up this case. First, as noted above, the parties and legal issues are virtually identical. Second, Plaintiffs waited over two years after filing their 1996 Complaint in Turkey to file a second lawsuit in this Court, and did not perfect service until late 1999 and January 2000. If there is any prejudice that would result from having this Court take us the case, it would flow against Defendants, who would have to defend "identical issue[s] in two fora on either side of the Atlantic Ocean." See Continental Time Corp. v. Swiss Credit Bank, 543 F.

Supp. 408, 410 (S.D.N.Y. 1982). Aside from possibly one cause of action, and some procedural difference in the law, Plaintiffs remedies are not foreclosed in Turkey. Finally, it would be extremely wasteful for two courts to undertake similar discovery issues, substantive motions, and possibly even two trials, for almost identical cases.

Plaintiffs argue that "the principle of comity...allows concurrent jurisdiction by the courts in two different cases...." Plaintiff also cites to examples in which a federal court has allowed a parallel proceedings to take place currently with a foreign jurisdiction. See, e.g., Laker Airways v. Sabena, Belgian World Airways, 731 F.2d 909 (D.C. Cir. 1984); Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines, 925 F.2d 1193 (9th Cir. 1991); General Motors Corp. v. Ignacio Lopez de Arriortua, 948 F. Supp. 656 (E.D. Mich. 1996); Ludgate Ins. Co. v. Becker, 906 F. Supp. 1233 (N.D. III. 1995); Herbstein v. Bruetman, 742 F. Supp. 184 (S.D.N.Y. 1990).

The Court finds these cases to be readily distinguished from this case in critical ways. First, this is not a case where the Defendants initiated a suit in a foreign jurisdiction to terminate the federal court's jurisdiction. See, e.g., Laker Airways, 731 F.2d 909 (D.C. Cir 1984). Nor is this a case where the defendant is attempting to develop litigation in a foreign jurisdiction. See, e.g., Gua Shan Co. v. Bankers Trust Co., 956 F.2d 1349 (6th Cir. 1992). Nor is this a case where the foreign action is "largely unrelated" to the action in the U.S. court. See, e.g., Ludgate Ins. v. Becker, 906 F. Supp. 1233 (N.D. III. 1995). They are, in fact, nearly identical. Cf. General Motors Corp. v. Ignacio Lopez de Arruirtua, 948 F. Supp. 656 (E.D. Mich. 1996).

While the Court will not find, as Defendant posits, that Plaintiffs have engaged in forum-shopping, the Court acknowledges that Plaintiffs actions border dangerously on it. Plaintiffs filed this suit first in Turkey, and then waited two years to file a second suit in Maryland. Plaintiffs' purported concerns about Turkey could have easily been

discovered before filing suit in that country. Now, over three years into the proceedings in Turkey, Plaintiffs would have this Court hear a second, identical case. Defendants cite Judge Sirica to argue that Plaintiffs' actions constitute "forum-shopping with a vengeance." See Brinco Mining Ltd. v. Federal Insurance Company, 552 F. Supp. 1233 (D.D.C. 1982) quoting International Transportation Co. v. Sea-Land Services, Inc., 1969 A.M.C. 1676 (S.D.N.Y. 1982). ("To bring an action in this district in the hope of obtaining a more favorable rule of law than now obtains in the district where the [plaintiff] first elected to sue is forum-shopping with a vengeance."). The Court does not need to reach that conclusion about Plaintiffs' intentions to recognize the inherent problems and conflicts of creating a parallel proceeding at such a late date. The Court believes that in the interest of international comity the Court should decline the second case in deference to the identical case filed first in Turkey.

IV.

For the reasons stated herein, the Court will deny Plaintiffs' Motion for Discovery on Jurisdictional Issues and will grant Defendants' Motion to Dismiss. This, of course, renders moot Defendants alternative motion to stay the proceedings. An Order consistent with this Memorandum Opinion will follow.

3-31-00
Date

/s/
Alexander Williams, Jr.
United States District Judge

FILE COPY
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Entered: April 17, 2001

FILED
April 17, 2001

No. 00-1552
CA-98-3863-AW

JOEL S. MEISEL ; NEW WORLD PARKING, INCORPORATED; WORLDWIDE PARKING, INCORPORATED,

Plaintiffs – Appellants,

v.

BESIR KEMAL USTAOGLU; HASIBE USTAOGLU; REPIMEKS DIS TICARET LIMITED SIRKETI,

Defendants – Appellees.

On Petition for Rehearing and Rehearing En Banc

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,
/s/ Patricia S. Connor
CLERK

bcc: Honorable William W. Wilkins Jr.
Circuit Judge

Honorable J. Michael Luttig
Circuit Judge

Honorable Clyde H. Hamilton
Senior Circuit Judge

Record No. 00-1552

Entered: March 20, 2000

In The
United States Court of Appeals
For The Fourth Circuit

JOEL S. MEISEL;
NEW WORLD PARKING, LLC;
WORLDWIDE PARKING INCORPORATED,

Plaintiffs - Appellants,

v.

BESIR KEMAL USTAOGLU;
HASIBE USTAOGLU;
REPIMEKS DIS TICARET LIMITED SIRKETI,

Defendants - Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
AT GREENBELT

APPELLANTS' PETITION FOR REHEARING WITH PETITION FOR REHEARING *EN BANC*

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FRAP 35 1

STATEMENT OF PURPOSE

Petitioners, Joel S Meisel et al., respectfully submit this Petition for Rehearing *en banc* pursuant to Federal Rules of Appellate Procedure 35. This petition is based on several grounds. First, material facts and material laws -namely the laws of Maryland and the conflict of law rules of Turkey - were overlooked in the decision. Second, the opinion is in conflict with other court of appeals decisions.

In addition, this case involves questions of exceptional importance. The first question is whether forcing American plaintiffs to pass three major hurdles to litigate in their home forum against American-resident defendants concerning issues of American law is a violation of the Due Process Clause. The second question is whether, under the doctrine of international comity and the facts at issue here, a court should follow the "concurrent jurisdiction" or the "first-filed" rule. This question is particularly important because the Supreme Court has not yet ruled on this issue.

STATEMENT OF FACTS

Petitioners are in the business of providing parking management services to cities in the United States and abroad. In 1994, they gave approximately $1.3 million in loans from the Maryland company to the Ustaoglus with no accompanying loan documents. In 1995, the parties entered into a written Protocol by which terms the Ustaoglus acknowledged that they received the loans from Maryland and promised to pay back the loans to Maryland. In September of 1996 after the Ustaoglus failed to begin to repay the loans, Petitioners sued in the courts in Istanbul, Turkey. The courts in Turkey have held 25 investigative hearings since September 1996 with no end in sight to the Turkish proceedings.

In November 1998, Petitioners filed a lawsuit against the Ustaoglus in the federal district court in Maryland. The Maryland complaint set out tort and contract counts under Maryland law and asked for an amount in damages that was equal to the outstanding, unpaid loans. From November of 1998 until December 1999, Petitioners could not locate the Ustaoglus in order to perfect service on them. At the end of December 1999, the Ustaoglus were served at a home they had purchased in the State of Washington in the United States.

The Ustaoglus' motion to dismiss the Maryland case on the ground of *forum non conveniens* was granted on the ground that a parallel case was already in process in Turkey. The Panel affirmed the lower court decision on March 6, 2001 with no written opinion.

ARGUMENT

I. MATERIAL FACTS AND LAWS WERE OVERLOOKED IN THE DECISION

The Panel overlooked material facts and material laws in its decision. The material facts overlooked by the Panel include the location of the relevant witnesses. The material laws overlooked by the Panel were Turkish conflicts of law rules and Maryland law including Maryland conflicts of law rules.

A. The Panel Overlooked Material Facts

The lower court and the Panel overlooked material facts with respect to the location of witnesses for the Ustagolus. The lower court based its decision to dismiss, in part, on the fact that witnesses from Turkey would have to come to Maryland to testify, "not the least of which is the Turkish attorney who drafted most of the documents" (JA 185). The Panel, in adopted the lower court's opinion

wholesale, failed to recognize the material fact that the Turkish lawyer who drafted the documents is a resident of Maryland who owns a house in Bethesda, Maryland where his family lives and where his children attend school. The court below and the Panel also overlooked the material fact that the Ustaoglus are now U.S. residents having moved to the United States to live in a home they purchased in the State of Washington (JA 11-112). As American residents, the defendants below have to be counted as American witnesses and not as Turkish witnesses in any Maryland court proceeding.

The issue of the location of the witnesses is important because the lower court based its dismissal of the Maryland action, in part, on its conclusion that the factor of the number of witnesses from Turkey would be evenly split between both forums (JA 185).

B. The Panel Overlooked Turkish Conflicts of Law Rules

In their brief, Petitioners clearly pointed out that Turkish conflicts of law rules would choose Maryland law to govern the provisions of a loan made from Maryland (Petitioners' Brief, pp. 14-15). Turkish conflicts of law rules adopt the principal of *renvoi*. Under this rule, the court looks back to the law that applies where the conflict originally arose.

Since the conflict primarily concerns loans made from Maryland in 1994, which the Ustaoglus failed to pay back to Maryland, the Turkish *renvoi* rule would apply Maryland law to the Maryland loan issue. The lower court and the Panel ignored the question of what law would be applied in Turkey (that is, the Turkish *renvoi* rule) and simply adopted the lower court's erroneous ruling that Turkish law would apply to construe the Maryland loan. Since the lower court decided that Turkish law would apply, it further concluded that a U.S. court would face "difficult

conflicts of law issues" in deciding this case (JA 186). Since the Turkish *renvoi* rule would require that Maryland law be applied regarding the loans, this conclusion is obviously erroneous.

The question of which law will be applied to the facts of this case is vitally important because the lower court erroneously based its decision on the purported (but actually untrue) "difficult conflicts of law issues" (JA 186). Both the lower court and the Court of Appeals overlooked material law in this case, namely Turkish conflicts of law rules and the Turkish *renvoi* rule. If these material laws were applied correctly in this case, Maryland law would be applied by a Maryland court resulting in no "difficult conflicts of law issues." Under *forum non conveniens* analysis, the absence of "difficult conflicts of law" issues would tend to allow the case to be heard in a U.S. court.

C. The Panel Overlooked Maryland Law

The Panel overlooked Maryland law when it failed to apply Maryland case law concerning where the cause of action arises in the case of a breach of promise to repay a debt. The Panel also overlooked Maryland conflicts of law rules, particularly the *renvoi* rule applied in Maryland. The court below and the Panel held that the loan agreements were accepted in Turkey; therefore Turkish law would apply (JA 186).

The lower court and Panel, however, overlooked Maryland law as set out in Kane v. Schuhever, 708 A.2d 1038, 1045 (Md. 1998), where the Court of Appeals held that a "cause of action for a breach of promise [to pay a debt] arises where the breach occurs, and the breach occurs where the debt was payable." In this present case, the breach occurred in Maryland because that is the location to which the loans should have been re-paid. Thus, under Maryland law, the place of the acceptance of the loan documents (Turkey) is not relevant to the issue of where the cause of

action arose. Under Maryland law, the only relevant fact is where the breach occurred – which in this case is Maryland. Since the breach occurred in Maryland, Maryland law must be applied to the breach, not Turkish law (as erroneously found by the lower court and the Panel).

Even if the lower court and the Panel were correct in their conclusion that the case involves a contract entered into in a foreign country, they overlooked the Maryland *renvoi* rule, which applies to such contracts. According to Commercial Union v. Porter Hayden Co., 698 A.2d 1167, 1203-1204, cert. denied 703 A.2d 147(Md. 1997), the law of the forum state is applied to contracts entered into in a foreign state when (1) the forum state has a substantial relationship with respect to the particular contract issue presented in the litigation; and (2) the state where the contract was entered into would not apply its own substantive law but would apply the substantive law of the forum state. As we have seen above, Turkish conflicts of law rules, including its *renvoi* rule, would apply Maryland law.

The Panel, by overlooking material facts and material law barred Petitioners from suing in their home forum. As a result, the Fourth Circuit should hear this case *en banc*.

II. THE OPINION IS IN CONFLICT WITH OTHER COURT OF APPEALS DECISIONS

The lower court decision, as adopted wholesale by the Panel, is in conflict with the Second Circuit in its application of the *forum non conveniens* factors as set out in Gulf Oil v. Gilbert, 330 U.S. 501 (1947). The Second Circuit in Guidi v. Intercontinental Hotels Corp., 203 F.3d 180 (2000), overturned the lower court's *forum non conveniens* dismissal on the ground that there were parallel lawsuits going on in both Egypt and the United States. The Guidi court, *id.* at 184, emphasized the importance of

applying the heightened deference standard for plaintiffs in their home forum as set out in Koster v. Lumbermens Mut. Cas. Co., 330 U.S. 518 (1947). The Second Circuit found that it was unsound for the lower court to rely exclusively on a discussion of the Gilbert factors in deciding on a motion to dismiss on the ground of *forum non conveniens*. Because the lower court simply applied the Gilbert factors without giving deference to the American plaintiff choosing his home forum, the Second Circuit reversed. In this present case, the Panel relied exclusively on a discussion of the Gilbert factors in its *forum non conveniens* decision and is, therefore, in conflict with the Second Circuit.

In addition, the Panel here failed to apply the Koster heightened deference standard to Petitioners who are American plaintiffs attempting to sue in their home forum. As a result, the Panel's decision is in conflict with the Second Circuit's Guidi decision.

The Panel's decision is further in conflict with the Second Circuit opinions in Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41 (1996), and in R. Maganlal & Co. v. M.G. Chemical Co., Inc., 942 F.2d 164 (1991). In both of these cases, the Second Circuit pointed out that although the foreign country involved had a local interest in protecting its companies, the U.S. forum had a countervailing strong interest in the litigation. The Peregrine Myanmar court emphasized that the court starts with a presumption in favor of the plaintiff's choice of forum and the defendant has the burden of overcoming this presumption by establishing that the Gilbert factors "tilt strongly" in favor of the foreign forum, 89 F.3d at 47.

The R. Maganlal opinion by the Second Circuit highlighted the fact that the Gilbert factors must "weigh heavily in favor of trial in the alternative forum," 942 F.2d at 167. Certainly when the Gilbert factors are applied correctly in this present case, it is clear that these factors do not "weigh heavily in favor of trial" in the alternative forum.

The lower court and the Panel here placed the burden incorrectly on the Petitioner and failed entirely to take into consideration any of the local forum's countervailing interests in the litigation. These countervailing interests included the facts that the plaintiffs were Maryland residents; that the defendants resided in the U.S.; that the loans were made from Maryland and were to be paid back to Maryland; and that, under Maryland and Turkish law, failure to re-pay the loans was to be construed under Maryland law.

The Panel's decision is further in conflict with the D.C. Circuit's opinion in Founding Church of Scientology v. Verlag, 536 F.2d 429, 435 (1976), where the D.C. court found great significance in the fact that both parties were U.S. residents and that the damages occurred in the United States. The D.C. Circuit emphasized that the court "should be thoroughly convinced that material injustice is manifest before denying a citizen access to the courts of this country." The Panel here, however, placed the burden of complying with the Gilbert factors on the Petitioners instead of on the Ustaoglus where it belonged. The Panel further ignored the fact that both parties were U.S. residents and that the damages complained of occurred in the United States.

Thus, the Panel's decision is in conflict with both the Second Circuit and the D.C. Circuit on the issue of application of the *forum non conveniens* factors, particularly which party has the burden of persuasion on these factors and whether deference is to be given to an American plaintiff suing in his home forum. Therefore, the Fourth Circuit should grant rehearing *en banc* for the reason that the Panel's decision conflicts with the decisions of other circuits.

III. THERE IS A CONSTITUTIONAL QUESTION AS TO WHETHER FORCING AN AMERICAN PLAINTIFF TO PASS THREE HURDLES TO GET INTO AN AMERICAN COURT IS A VIOLATION OF DUE PROCESS.

This is potentially one of the most significant cases that will be considered by the Fourth Circuit this term. It involves a constitutional due process issue defining the parameters of federal court jurisdiction when a case involving similar facts and parties is pending in a foreign forum.

Petitioners are attempting to bring suit in a U.S. court against American-resident defendants over Maryland loans, which the defendants refused to pay back to Maryland. Under Koster, such a plaintiff suing in his home forum is supposed to be accorded deference as to choice of forum.

Yet this Panel, in adopting the lower court's decision wholesale, arbitrarily set up three major hurdles for the Petitioners to cross before they can get to their home forum. First, the Panel required Petitioners to bear the burden of persuasion on the Gulf Oil v. Gilbert *forum non conveniens* factors. Proper application of these factors would have required the defendants below, not the Petitioners to meet the burden of persuasion.

Second, the Petitioners were also required to meet all of the tests set out in the doctrine of international comity. Since the lower court and the Panel erroneously applied the "first filed" rule as opposed to the "concurrent jurisdiction" doctrine, Petitioners were independently barred from federal court on comity grounds.

Finally, Petitioners were refused the right to conduct limited *forum non conveniens* discovery in order to gather the facts required to meet the *forum non conveniens* and international comity tests. Thus, the Panel adopted two separate tests for the petitioners to pass before being allowed to sue in their home forum, yet denied Petitioners the

discovery tool that they needed to determine whether they could meet any of the tests.

The Panel's decision results in the denial of a U.S. forum to an American plaintiff attempting to sue American-resident defendants over a loan made from Maryland to be paid back to Maryland. Further, as detailed above, under Turkish law and Maryland law, the terms of the Maryland loan are to be construed under Maryland law when the issue is before an American court.

The multiple hurdles set up by the Panel for Petitioners to get into their home forum do not comport with due process as required by the U.S. Constitution. The denial of due process is particularly apparent in view of the Supreme Court's emphasis on the duty of the federal courts to exercise the jurisdiction given to them. Quakenbush v. Allstate Ins. Co., 517 U.S. 706, 707, 116 S. Ct. 1712 (1996).

IV. CLARIFICATION OF WHETHER THE COURT IS TO FOLLOW THE CONCURRENT JURISDICTION RULE OR THE "FIRST-FILED" RULE UNDER THE PRINCIPLE OF COMITY IS EXCEPTIONALLY IMPORTANT.

This case is important to clarify two conflicting lines of cases in the comity area, those of concurrent jurisdiction (relied on by Petitioner) and those setting out the "first-filed" rule (relied on by the Ustaoglus and adopted by the Court). Neither the Supreme Court nor the courts of appeals have ever reconciled these conflicting lines of cases.

Since international business transactions are becoming more frequent and more important to businesses located within the boundaries of the states covered by the Fourth Circuit, it is vital to have clear rules to follow when two countries have valid claims for asserting jurisdiction over the same dispute. States such as Virginia and Maryland have been particularly active in encouraging the establishment of new companies because these companies

provide employment and tax revenues for those states. A newly-created company, however, is likely to be unsophisticated in dealing with foreign partners, bureaucracies and courts. Domestic American courts should be receptive to resolving conflicts confronted by these new businesses. Barring access to the local courts for these new international businesses would frustrate the states' policies in fostering the growth of these new businesses.

With respect to international comity considerations, "[o]nce a foreign defendant is found to be under the jurisdiction of a U.S. court, concerns about international comity are limited," and "if a court finds the assertion of jurisdiction is appropriate, international comity concerns must either be minimal or outweighed by other factors," Dooley v. United Technologies Corp., 803 F. Supp. 428, 440 (D.D.C. 1992). The question of how to apply the doctrine of comity in cases where a parallel lawsuit is pending overseas is particularly important because the Supreme Court has not ruled on this issue.

CONCLUSION

For the foregoing reasons, Appellants Joel S Meisel, et al., respectfully request this court to rehear their case *en banc*. Additionally, the judgment of the District Court should be reversed and this case should be remanded for further proceedings.

Respectfully Submitted,

/s/_____

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Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2001, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via Hand Delivery the required number of copies of this Appellants' Petition for Rehearing with Petition for Rehearing *En Banc*, and further certify that I served, via US Mail, postage prepaid a copy of said Petition to the following:

Steven A. Hammond
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& REED
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Counsel for Appellees

The necessary filing and service to Counsel was performed in accordance with the instructions given me by counsel in this case.

THE LEX GROUP
1108 East Main Street
Suite 1400
Richmond, Virginia 23219

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Entered: February 28, 2000

Joel S. Meisel, et al.,	)	
Plaintiffs,	)	
	)	
v.	)	**Civil No. AW98CV3863**
	)	
Besir Kemal Ustaoglu, et al.,	)	
Defendants.	)	

AFFIDAVIT OF CATHERINE E. BOCSKOR

1. I am General Counsel of WorldWide Parking Inc. located at 6000 Executive Boulevard, Suite 700, Rockville, Maryland 20895. My home address is 3216 Geiger Avenue, Kensington, Maryland 20895. I have personal knowledge of the matters in the affidavit, and I submit it in support of Plaintiffs' Response to Motion to Dismiss or Stay Complaint.

2. I have obtained copies of deeds to two houses owned by Besir Kemal Ustaoglu and Hasibe Ustaoglu located in King County, Washington and Snohomish County, Washington. Those deeds are attached to this affidavit as Exhibit A and Exhibit D. The deed to the property identified as Lot 11, March Commons P.U.D. in King County, WA shows that the Ustaoglus purchased this property on August 9, 1999 (Exhibit A). The Ustaoglus took out a deed of trust in the amount of $693,750 to buy this property which deed identifies the address of Lot 11, Marsh Commons P.U.D., as 10145 NE 66th Lane, Kirkland, WA (Exhibit B). This was the residence at which the Ustaoglus' were personally served with process by a

Washington State process server at 9:15 a.m. on Sunday morning, December 19, 1999 (Exhibit C, Return of Service).

3. The deed to the Mill Creek, WA property identified as Lot 3, Hillcrest Glen in Snohomish County, Washington shows that the Ustaoglus purchased property on September 19, 1996 (Exhibit D). This property was purchased at the same time that plaintiffs filed suit against the Ustaoglus in Turkey. This property was apparently sold September 9, 1999.

4. I retained a private investigative service to determine whether the Ustaoglus have social security numbers and bank accounts in the United States. This service reported to me that Besir Kemal Ustaoglu has a social security number and a bank account in the State of Washington (Exhibit E).

5. Another private investigative service in 1996 revealed to WorldWide Parking's outside law firm that Besir Kemal and Hasibe Ustaoglu had an address and a bank account at Fleet Bank in Boston, Massachusetts and that Repimeks Dis Ticaret had a bank account at Fleet Bank in Boston (Exhibit F).

6. I called Fleet Bank in Boston on February 2000 to ascertain the requirements for a company to set up a bank account at Fleet Bank in 1996. I was told the company must show a copy of its articles of incorporation as a U.S. entity, a corporate resolution to open the bank account and nominating the signatories, and a U.S. federal employer identification number (or a similar state tax identification number). I also asked Fleet Bank whether an individual must have had a social security

number in 1996 in order to open an individual bank account at Fleet Bank. I was told that Fleet Bank will not open an individual bank account without a social security number for that individual.

7. I have practiced immigration law, among other areas of law, in Washington, D.C. and Maryland for over twenty years. As such I am familiar with the requirements for a non-resident alien to obtain a social security number. A non-resident alien can only obtain a social security number either by obtaining a permanent resident visa or a temporary work-based visa, which allows him to legally work in the United States. It is possible for an alien to get an L visa (for which he can get a special social security number good only for the purposes of opening a bank account) if his company transfers him from his home country to the U.S. In this case the company has to be duly established in the United States as a U.S.-entity. This information was confirmed in a telephone conversation with Steven Fischel, Chief of the U.S. State Department Office of Legislation, Regulation and Advisory Assistance on February 20, 2000.

8. I received from the European Commission office in Washington, D.C. the text of its 1998 report on Turkish accession to EU membership. Pages 11 and 12 of that report relating to the state of the Turkish judiciary are attached to this affidavit as Exhibit G. In describing the Turkish judiciary, page 12 of this report relates that "difficult working conditions, including low salaries, are not conducive to the impartial administration of justice. There are many cases of corruption."

9. I received from the office of the Turkish Industrialists' and Businessmens' Association (TUSIAD) in Washington, D.C. the executive summary of their 1998 report "Quality in the Judicial System" which discusses the Turkish judicial system and is attached to this affidavit as Exhibit H. Pages 19 and 20 of this report point, in particular, discuss the problems of severe delays in the Turkish civil courts and note that the "practice of referral of certain matter to courts experts is increasingly creating problems." Page 13 of the report also points out that the Court of Appeals has a very heavy caseload.

10. In researching the issue of whether a U.S. court can render an award in currency denominated other than U.S. dollars, I have found the attached article from the legal journal, The International Lawyer, published by the American Bar Association in 1989. This article was reprinted at pages 1227-1231 of International Business Transactions, Third Edition, Folsom, Gordon, Spanogle, eds., West Publishing Company, St. Paul, MN, 1995, from which it has been photocopied and is attached to this affidavit at Exhibit I. This article points out that until recently neither U.S. courts nor other common law courts could make awards in any currency other than their local currency.

I hereby swear that the contents of the foregoing Affidavit are true.

/s/_____
Catherine E. Bocskor

Sworn and subscribed to before me this 24th day of February, 2000

/s/_____
Notary

State of Maryland
County of Montgomery

LINDA ABRAMS
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires 8/1/2003